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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

ENERGY WEST, INC.,

Petitioner,

v.

DELORES TACKE,

Respondent.

On Petition for Writ of Certiorari to the Montana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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May 24, 2010

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QUESTION PRESENTED FOR REVIEW

Whether a court can award attorneys' fees pursuant to the Fair Labor Standards Act where the Petition for Attorneys' Fees is supported by an Affidavit from counsel stating only the total lump sum number of hours spent on the entire litigation without providing contemporaneous time records reflecting the hours expended and the nature of the work done on each date work was performed.

RULE 29.6 STATEMENT

Energy West's parent company is Energy, Inc.

Energy, Inc. is a publically traded company and it is the parent company of Energy West, i.e., Energy, Inc. owns 100% of the stock of Energy West.

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OPINIONS BELOW

The original Judgment dated November 25, 2008, which reflects the jury's November 14, 2008 verdict, was not officially reported but is reproduced in the Appendix at E. The District Court's July 22, 2009 Order regarding attorneys' fees and costs was not officially reported and is reproduced in the Appendix at B. The Opinion of the Montana Supreme Court was published and can be found at 355 Mont. 243, 227 P.3d 601 (2010) and is reproduced in the Appendix at A.

JURISDICTIONAL STATEMENT

Petitioner respectfully requests that this Court grant their Petition for a Writ of Certiorari to review the Montana Supreme Court Decision regarding the award of attorneys' fees to Respondent in *Tacke v. Energy West, Inc.*, 355 Mont. 243, 227 P.3d 601 (2010) which was decided on February 23, 2010. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a) because the decision was decided applying federal law.

STATUTORY PROVISION INVOLVED

29 U.S.C. §216(b)

Damages; right of action; attorneys' fees and costs... The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow reasonable attorneys' fees to be paid by the defendant, and costs of the action...

STATEMENT OF THE CASE

Respondent filed this action against Petitioner in state court in the Eighth Judicial District, County of Cascade, State on Montana alleging violations of the federal Fair Labor Standards Act, 29 U.S.C. §201 et seq. (hereinafter "FLSA"). Respondent alleged that she had been misclassified as an exempt employee and was seeking to recover unpaid overtime compensation for hours she had worked in excess of 40 hours per week but for which she had not been paid at the rate of one and one-half times her regular hourly rate as required by the FLSA. After the District Court denied cross-motions for summary judgment, the matter proceeded to a jury trial. The jury returned a verdict in favor of Respondent in the amount of $35,220.00 as is reflected in the Judgment entered on November 25, 2008, which is attached hereto as Appendix E and the Amended Partial Judgment entered on December 4, 2008, which is attached hereto as Appendix D.

A hearing was held on January 12, 2009 regarding the award of costs and liquidated damages, after which the District Court entered a Second Amended Partial Judgment on January 15, 2009 awarding an additional $35,220 in liquidated damages and $4,958.73 in costs to Respondent. A copy of the Second Amended Partial Judgment is attached as Appendix C. The court entered a Final Judgment on July 21, 2009, when it issued an Order awarding an additional $4,372.10 in expert witness fees, $1,147.10 for travel expenses for Attorney Howard Strause, $95,737.50 in attorneys' fees for Attorney Elizabeth Best and $90,675.00 in attorneys' fees for Attorney Howard Strause. A copy of the July 21, 2009 Order for attorneys' fees is

attached as Appendix B. The total judgment, including attorneys' fees and costs is for $267,330.43.

On August 17, 2009, Energy West filed a Notice of Appeal with the Supreme Court of the State of Montana from the various judgments cited above, including the July 21, 2009 Order on attorneys' fees. On February 23, 2010, the Supreme Court of the State of Montana issued its Opinion upholding the verdict of the District Court in all regards in *Tacke v. Energy West, Inc.*, 355 Mont. 243, 227 P2d 601 (2010).

1. Statement of Facts and Issues

Respondent has been employed by Petitioner in various positions since 1970. During the period of time relevant to this lawsuit, Respondent was responsible for running Petitioner's credit department. In 1997, Respondent switched from being paid as an hourly employee to being paid as a salaried employee. At that same time, Petitioner began paying Respondent as if she was exempt from the FLSA's requirements that employees be paid overtime for hours worked in excess of 40 hours per week.

In 2004, Petitioner began questioning whether Respondent was properly classified as an exempt employee. As a result, she was temporarily returned to an hourly status based on an internal determination that she did not meet the requirements of the executive exemption. Upon further analysis, however, Petitioner subsequently determined that Respondent was exempt pursuant to the administrative exemption and returned her to her salaried status under which she was not paid overtime.

Respondent ultimately brought this claim in state court seeking to recover unpaid overtime compensation to which she believed she was entitled pursuant to the federal FLSA. The matter was tried in state court applying the federal substantive law of the FLSA. The principal issues at trial were whether Respondent qualified as an exempt employee, and, if she did not, what was the amount of unpaid overtime compensation to which she was entitled. The jury returned a verdict in Respondent's favor, determining that she was not properly classified as an exempt administrative employee, and awarded her $35,220 in unpaid overtime compensation.

Subsequent to the jury trial, the parties undertook post judgment proceedings addressing whether Respondent was entitled to liquidated damages and/or attorneys' fees.

Respondent submitted a petition for attorneys' fees that included affidavits from both of her counsel, Attorneys Howard F. Strause and Elizabeth Best. Neither the petition nor Attorney Strause's or Best's affidavits provided any contemporaneous billing records breaking down the number of hours of work performed in connection with any particular activities on any particular dates. Rather, Attorney Strause's affidavit provided that he had "reasonably expended 397.14 hours, to date, in the representation of Plaintiff" and Elizabeth Best's affidavit provided that she had "reasonably expended 405 hours, to date, in the representation of the Plaintiff." Both Attorney Best and Attorney Strause testified at the July 21, 2009 attorneys' fees hearing that they had also worked additional hours dealing with the post trial issues, but did not provide any detailed breakdown of how those

hours were spent. These lump sum hourly totals were the only information submitted by Respondent which the District Court could rely on in determining the number of hours Respondent's counsel had spent on the litigation. The District Court accepted the total number of hours attested to by Respondent's counsel and awarded a total of $186,412.50 in the July 21, 2009 Order regarding attorneys' fees. The District Court reached this total by multiplying the total number of hours worked by Attorneys Strause and Best by an hourly rate of $225.00 per hour.

Petitioner appealed the jury's verdict, the award of liquidated damages and the award of attorneys' fees and costs to the Montana Supreme Court. With respect to the attorneys' fee issue which is the subject of this Petition for Writ of Certiorari, Petitioner argued that Respondent had not met her burden of proof in connection with her petition for attorneys' fees. Petitioner argued that in utilizing the lodestar method for calculating attorneys' fees, the Respondent had the burden of supporting her request with contemporaneous time records reflecting, for each attorney, the hours expended and the nature of the work done. Because the Respondent had simply submitted lump sum hourly totals, the District Court had no ability to assess the time spent on each activity to determine whether the work undertaken with respect to each activity was reasonable or make any determination as to whether Attorney Strause and Best unnecessarily duplicated efforts with respect to any particular tasks. While the Montana Supreme Court was critical of Respondent's counsels' failure to submit detailed billing records, it ultimately refused to apply a per se rule requiring that such detailed information be submitted, and upheld the District

Court's award of attorneys' fees based on the evidence submitted:

> The District Court conducted a careful review of the fee issue and we conclude that it exercised conscientious judgment and did not clearly err in evaluating the evidence or abuse its discretion in approving the fee award. However, while we do not adopt a per se rule as some courts have done, we strongly urge counsel to keep and provide contemporaneous time records in support of attorneys' fees requests and fee-shifting cases, and we encourage District Courts to look askance at requests not so supported.

Tacke v. Energy West, Inc., 355 Mont. 243, 254, 227 P2d 601, 610 (2010).

REASON FOR GRANTING THE PETITION

> A court cannot award attorneys' fees pursuant to the Fair Labor Standards Act where the Petition for Attorneys' Fees is supported by an Affidavit from counsel stating only the total lump sum number of hours spent on the entire litigation without providing contemporaneous time records reflecting the hours expended and the nature of the work done on each date work was performed.

This Court has recognized that the general rule in the American legal system is that each party must pay its own attorneys' fees and expenses. *Perdue v. Kenny A.*, ___U.S. ___, ___, 130 S.Ct. 1662, ___, 176 L.Ed.2d 494, 504 (2010). Congress, however, has enacted

various federal laws which abrogate this common law rule, and provide that prevailing parties can recover their attorneys' fees. Among the laws which allow prevailing plaintiffs to recover attorneys' fees is the FLSA, which provides that the District Court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow reasonable attorneys' fees to be paid by the defendant, and costs of the action." 29 U.S.C. §216(b). Like other statutory provisions providing for attorneys' fees, the FLSA does not set forth a specific framework for determining how a reasonable attorneys' fee should be calculated. The task of identifying an appropriate methodology for determining a reasonable attorneys' fee was therefore left to the courts. *Perdue* ___ at ___, U.S. at ___, 130 S.Ct. at ___, 176 L.Ed.2d at 504.

This Court recently recognized that the lodestar method for calculating attorneys' fees has "achieved dominance in the federal courts" and has "become the guiding light of [the Supreme Courts'] fee shifting jurisprudence." *Perdue*, ___, ___U.S. at ___, 130 S.Ct. at ___, 176, L.Ed.2d at 504 quoting *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002).

The lodestar method of calculating attorneys' fees provides that the attorneys' fee award is "the product of reasonable hours times a reasonable rate." *City of Burlington v. Dague*, 505 U.S. 557, 559-560 (1992) quoting *Pennsylvania v. Delaware Valley Citizen's Counsel for Clean Air*, 478 U.S. 546, 565 (1986). This Court has not, however, ever spoken to the issue of what evidence must be submitted by the party petitioning for attorneys' fees to prove the reasonable number of hours expended on the litigation. Lower federal courts, however, have held that the "plaintiff

has the burden of proving in the first instance the extent and reasonableness of requested attorneys' fees with meticulous and contemporaneous time records." *Sheets v. Salt Lake County*, 45 F.3d 1383, 1391 (10th Cir. 1995). The Montana Supreme Court, in this case, however, refused to apply a per se rule that counsel provide contemporaneous time records in support of attorneys' fees requests in fee shifting cases, even though it was applying federal law pursuant to the FLSA. *Tacke v. Energy West, Inc.*, 355 Mont. 243, 254, 227 P.3d 601, 610 (2010).

This Court has recognized one of the advantages of the lodestar method for calculating an attorneys' fee award is the fact that it "produces an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour on a comparable case." *Perdue*, __ U.S. __, 130 Ct. at __, 176 L.Ed.2d at 505. Moreover, the lodestar method "cabins the discretion of the trial judges, permits meaningful judicial review, and produces reasonably predictable results." *Id.* In the case at bar, Respondent's failure to provide a detailed breakdown of how the hours were spent in the litigation prevents appellate courts any opportunity to undertake a meaningful review of whether the time was reasonably spent. Moreover, it prohibits the awarding court from undertaking any meaningful analysis as to how the total number of hours was calculated.

Federal circuit courts have regularly held that fee petitions must be supported with some level of detail demonstrating how the total number of hours has been calculated. For example, the Tenth Circuit held that "counsel seeking fees must keep contemporaneous and

detailed records of their time...[explaining]...how many hours were spent researching, how many interviewing the client, how many drafting the complaint, and so on." *Sussman v. Patterson*, 108 F.3d 1206, 1212 (10th Cir. 1997) quoting *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983).

As far back as 1984, the First Circuit put attorneys on notice "that henceforth, in cases involving fee applications for services rendered after the date of this Opinion, the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction of any award or, in egregious cases, disallowance." *Gendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984). The Second Circuit made a similar pronouncement in 1983, holding that "hereafter, any attorney – whether a private practitioner or an employee of a non-profit law office – who applies for court-ordered compensation in this circuit for work done after the date of this Opinion, must document the application with contemporaneous time records. These records should specify, for each attorney, the date, the hours expended, and the nature of the work done." *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F. Supp. 2d 1136, 1148 (2d Cir. 1983).

Circuit courts have likewise upheld the denial of fee requests where the information submitted is insufficient. In *Vocca v. Playboy Hotel of Chicago, Inc.*, 686 F.2d 605, 608 (7th Cir. 1982), the Seventh Circuit rejected a fee application where the fee schedule "failed to set forth a sufficient description of the type of work performed." The court went on to hold that "counsel seeking statutory attorneys' fees has the duty to maintain accurate and detailed time records. It is

not enough to offer a rough estimate of the time expended and then explain discrepancies that arise with claims that they were offset in other places. Such claims are impossible to refute. District courts, entrusted with the task of ordering an unsuccessful litigant to pay the reasonable attorneys' fees of his opponent, may properly demand that a claim for such fees be fully supported by accurate and detailed records. When it is not, the request may be denied." *Vocca*, 686 F.2d at 608.

The United States Court of Appeals for the District of Columbia has recognized that the purpose of submitting the detailed records is "to permit the district court to make an independent determination whether or not the hours claimed are justified." *National Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982). In the case at bar, the Montana Supreme Court's refusal to require prevailing parties who are seeking fees pursuant to federal law to submit contemporaneous time records, undermines the rationale of the lodestar procedure. This Court has approved the lodestar method of calculating attorneys' fees specifically because it provides an objective basis for awarding the fees rather than giving the lower courts unfettered discretion. See *Perdue*, ___U.S. at ___, 130 S.Ct. at ___, 176 L.Ed. 2d at 504-505, recognizing the court's rejection of methods of calculating fees that "placed unlimited discretion in trial judges" in favor of the lodestar calculation which is "objective."

Lower courts, in implementing the lodestar approach to the attorneys' fee awards adopted by the United States Supreme Court, have recognized that it is important for courts to undertake a meaningful

analysis of the hours submitted to determine if they were reasonable. The Eleventh Circuit has held that time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity. *Norman v. Housing Auth.*, 836 F.2d 1292, 1303 (11th Cir. 1988). The trial court should examine the reasonableness of hours allotted to each specific task. *Ramos*, 713 F.2d at 554. In situations where there are multiple attorneys working on the case, courts can reduce the total hours claimed if there is a duplication of efforts. *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1544 (9th Cir. 1992). The practice undertaken by Respondent's counsel in this case does not allow any of this type of required analysis.

The practice of allowing counsel for prevailing parties to submit a single, lump sum total of hours spent on the entire litigation in connection with a fee shifting scheme provided by federal law will undermine the purpose of the lodestar method adopted by this Court. The Montana Supreme Court, in failing to follow the federal precedent, undermines the effectiveness of the fee shifting provisions of the FLSA set forth in 29 U.S.C. §216(b).

This Court possesses jurisdiction to review state court determinations that rest upon federal law. *Oregon v. Guzek*, 546 U.S. 517, 521 (2006) citing 28 U.S.C. §1257(a). The Montana Supreme Court's failure to follow clear federal precedent in enforcing the FLSA undermines the principles of federal law adopted by this Court in conjunction with issuing fee awards under fee shifting statutory provisions of federal law. Because this Court has never directly addressed the evidence which a party must submit to

support the calculation of the number of hours spent on the litigation, this Court should grant Petitioner's Writ for Certiorari to require parties seeking attorneys' fees pursuant to federal law, to support their petition with contemporaneous time records setting forth, for each attorney, the time spent on each activity on each date for which the party is seeking attorneys' fees.

CONCLUSION

For all the reasons set forth herein, Petitioner respectfully requests that this Court grant Petitioner's Writ for Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 09-0456
2010 MT 39

[Filed February 23, 2010]

DELORES TACKE,
Plaintiff and Appellee,

v.

ENERGY WEST, INC.,
Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District, In and For the County of Cascade, Cause No. BDV 05-1064 Honorable Julie Macek, Presiding Judge

COUNSEL OF RECORD:

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Submitted on Briefs: January 13, 2010

Decided: February 23, 2010

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Energy West, Inc. appeals from a jury verdict and subsequent District Court orders entering a judgment in favor of its employee, Delores Tacke, for overtime wages, liquidated damages, costs, and attorneys' fees under the Fair Labor Standards Act (FLSA). We affirm.

¶2 Energy West presents five issues on appeal, which we restate as follows:

¶3 *1. Did the District Court err in denying Energy West's motions for summary judgment and directed verdict regarding Tacke's status as an exempt employee*

for purposes of overtime compensation under the FLSA?

¶4 *2. Did the District Court err in awarding liquidated damages to Tacke?*

¶5 *3. Did the District Court err in awarding attorneys' fees to Tacke without requiring Tacke's counsel to provide contemporaneous time records?*

¶6 *4. Did the District Court err in awarding costs pursuant to FLSA instead of the Montana costs statute?*

¶7 *5. Did the District Court err in admitting Tacke's exhibits 2, 3, 4, and 13 over Energy West's objections?*

FACTUAL AND PROCEDURAL BACKGROUND

¶8 Tacke began work for Energy West in 1970 and held various positions within the company during her more than thirty-year career. Tacke filed suit against Energy West to recover overtime wages she claimed she had earned between September 15, 2002, and July 15, 2005.

¶9 During those years, Tacke worked as the Supervisor of the Credit and Collection Department, a position for which she received a salary and was classified by Energy West as an exempt employee. Tacke's exempt classification meant she was not entitled to receive overtime wages in addition to her salary.

¶10 In 2004, Tacke and other Energy West employees attended a wage and hour seminar in

Billings. The seminar spurred several management employees to question Tacke's classification as an exempt employee. Energy West's Human Resources Department advised Kurt Baltrusch, Director of Operations and Tacke's direct supervisor, of the potential error, and Baltrusch investigated the matter further.

¶11 Baltrusch testified that he sought advice from John Allen, who was both corporate counsel and the Human Resources Officer for Energy West. Allen instructed Baltrusch to ask Tacke to prepare a written list of her duties. Allen also provided Baltrusch a checklist to aid in determining whether Tacke should be classified as an exempt or non-exempt employee. Tacke provided a listing of her duties and the percentage of her time expended on each duty. After reviewing the list, Baltrusch testified that he again spoke with Allen and, although testimony was unclear about whether the two relied upon either the "executive" or "administrative" exemption set forth in law, both agreed that Energy West should reclassify Tacke as a non-exempt employee entitled to receive overtime compensation. Baltrusch testified he also spoke with others about the issue, including Energy West CEO David Cerotzke. Cerotzke initially disputed Baltrusch's conclusion but eventually allowed Baltrusch to reclassify Tacke as non-exempt.

¶12 On June 30, 2005, Baltrusch wrote a letter to Tacke informing her that Energy West was reclassifying her as non-exempt. The letter provided, in relevant part: "For some time there has been a question on your employment status, that is whether you are exempt or non-exempt for overtime. From my standpoint, you are a non-exempt employee and must

be paid when you work extra hours, that is, over 40 hours each week." Tacke testified that she discussed the details of the letter with Baltrusch and Allen, but that the issue of past uncompensated overtime was not resolved.

¶13 Tacke filed suit against Energy West in September 2005 in the Eighth Judicial District Court to recover claimed overtime compensation. After Tacke filed suit, Energy West reversed its decision to classify her as non-exempt, returning her to exempt status.

¶14 The District Court denied cross-motions for summary judgment, and the case proceeded to a jury trial. On November 14, 2008, the jury returned a special verdict in favor of Tacke for $35,220.00 in uncompensated overtime wages. The jury did not, however, find that Tacke proved by a preponderance of the evidence that Energy West's failure to pay overtime was willful.

¶15 The District Court entered a judgment on January 15, 2009, awarding Tacke $35,220.00 for uncompensated overtime wages, an additional $35,220.00 in liquidated damages, and $4,958.73 in costs. On July 21, 2009, the District Court awarded Tacke an additional $4,372.10 in expert witness fees, $1,147.10 for travel expenses for Attorney Howard Strause, and attorneys' fees of $95,737.50 for Strause and $90,675.00 for Elizabeth Best. Tacke obtained a total final judgment against Energy West for $267,330.43. Energy West appeals.

STANDARD OF REVIEW

¶16 We review the District Court's denial of motions for summary judgment and directed verdict *de novo*. *Tucker v. Farmers Ins. Exch.*, 2009 MT 247, ¶ 23, 351 Mont. 448, 215 P.3d 1 (citation omitted); *McKay v. Wilderness Dev., LLC*, 2009 MT 410, ¶ 26, 353 Mont. 471, 221 P.3d 1184 (citation omitted). When considering a summary judgment motion, a court may not "make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses." *Andersen v. Schenk*, 2009 MT 399, ¶ 2, 353 Mont. 424, 220 P.3d 657. The court may only "examine[] the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits to determine whether there is a genuine issue as to any material fact relating to the legal issues raised and, if there is not, whether the moving party is entitled to judgment as a matter of law on the undisputed facts." *Andersen*, ¶ 2 (citing M. R. Civ. P. 56(c); *Corporate Air v. Edwards Jet Ctr.*, 2008 MT 283, ¶ 28, 345 Mont. 336, 190 P.3d 1111). Similarly, a motion for a directed verdict is "proper only when there is a complete absence of any evidence to warrant submission to a jury." *Ryan v. City of Bozeman*, 279 Mont. 507, 510, 928 P.2d 228, 229-30 (1996) (citation omitted).

¶17 We review the District Court's award of attorneys' fees, costs, and evidentiary rulings for an abuse of discretion. *In re Marriage of Cameron*, 2009 MT 302, ¶ 17, 352 Mont. 375, 217 P.3d 78 (citation omitted); *Ritchie v. Town of Ennis*, 2004 MT 43, ¶ 8, 320 Mont. 94, 86 P.3d 11 (citation omitted); *Malcolm v. Evenflo Co.*, 2009 MT 285, ¶ 29, 352 Mont. 325, 217 P.3d 514 (citation omitted).

DISCUSSION

¶18 *1. Did the District Court err in denying Energy West's motions for summary judgment and directed verdict regarding Tacke's status as an exempt employee for purposes of overtime compensation under the FLSA?*

¶19 Energy West argues Tacke provided no facts establishing that she fell outside the administrative exemption to the FLSA and the District Court therefore erred in denying its motions for summary judgment and directed verdict. Tacke counters that she indeed presented evidence that her work did not qualify for the administrative exemption and that Energy West failed to show, as a matter of law, that she fit within the administrative exemption.

¶20 In 1938, Congress passed the FLSA "to prevent the use of unfair trade practices in interstate commerce leading to 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . .'" *Stewart v. Region II Child and Family Servs.*, 242 Mont. 88, 94, 788 P.2d 913, 917 (1990) (citation omitted). The FLSA requires employers to pay employees overtime compensation for hours worked in excess of forty hours per week. 29 U.S.C. § 207(a)(1). The FLSA provides exemptions for certain executive and administrative employees, but employers bear the burden of proving that the employee fits "plainly and unmistakably within the exemption's terms." *Mont. Public Employee's Assoc. v. Mont. Dept. of Transp.*, 1998 MT 17, ¶ 11, 287 Mont. 229, 954 P.2d 21 (citing *Spradling v. City of Tulsa*, 95 F.3d 1492, 1495 (10th Cir. 1996); *Aaron v. City of*

Wichita, 54 F.3d 652, 657 (10th Cir. 1995); *Reich v. Wyo.*, 993 F.2d 739, 741 (10th Cir. 1993)).

¶21 The administrative exemption relied upon by Energy West applies if three elements exist.[1] First, the employee must be "[c]ompensated on a salary or fee basis at a rate not less than $455.00 per week . . . exclusive of board, lodging, or other facilities." 29 C.F.R. § 541.200(a)(1). Second, the employee's "primary duty" must be "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.200(a)(2). "To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business . . . ." 29 C.F.R. § 541.201(a). Third, the employee's "primary duty" must include "the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(3). Such discretion or independent judgment must be "more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." 29 C.F.R. § 541.202(e). To aid in applying these three elements, the regulations provide examples of positions that qualify for the administrative exemption. 29 C.F.R. § 541.203; *see also* 29 C.F.R. § 541.703(b).

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[1] In 2004 the U.S. Department of Labor reorganized and clarified the regulations addressing the administrative exemption, but, for purposes of the analysis in this case, the substantive content of the regulations remained the same.

¶22 Applying these regulations to the evidence in the record leads us to conclude that the District Court did not err in denying summary judgment and a directed verdict to Energy West. We need look no further than Tacke's own testimony about her typical work day. At 6:00 a.m., Tacke began by printing notices for Energy West customers whose accounts were delinquent. The computer generated the list of notices, and the printing generally took Tacke two hours to complete. Around 8:00 a.m., Tacke would help cashiers open the mail and post payments to ensure Energy West did not shut off gas to a customer who had just paid a delinquent account. From 9:00 a.m. to 10:00 a.m., Tacke returned to printing notices for delinquent accounts until completed. For the rest of the morning, Tacke took "phone calls and payments from customers" and also called customers to arrange for Energy West to access inside meters. During the lunch hour and other break periods, Tacke filled in for the switchboard operator. For the rest of the afternoon, Tacke took additional phone calls from customers who wanted to pay on their past due accounts, entered customer payments on the computer system, and ensured Energy West had access to inside meters. According to Tacke, she addressed customer issues with the Public Service Commission less than once a month. She operated exclusively within Energy West's policies and manuals, and, similar to other employees, was authorized to "write off balances that people owe on their bills" of up to only $50.

¶23 This testimony, taken as true, establishes that Tacke did not meet the requisite elements, set forth above, for an administratively exempt employee. Although contested by Energy West, this evidence was nonetheless sufficient to raise genuine issues of

material fact about whether Tacke qualified for the administrative exemption. *See Andersen*, ¶ 2 (A court has no authority to "make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses" at the summary judgment stage.) Neither was there "a complete absence of any evidence to warrant submission to a jury" necessitating a directed verdict. *Ryan*, 279 Mont. at 510, 928 P.2d at 229-30 (citation omitted). We affirm the District Court's denial of Energy West's motions for summary judgment and directed verdict.

¶24 *2. Did the District Court err in awarding liquidated damages to Tacke?*

¶25 We review an award of liquidated damages under the FLSA utilizing multiple standards of review, although we have not previously stated them comprehensively. First, concerning the determination that an employer has or has not acted in good faith and on reasonable grounds, a district court's factual findings are reviewed for clear error and legal conclusions are reviewed *de novo* for correctness. *Tefft v. Mont.*, 271 Mont. 82, 91-92, 894 P.2d 317, 323 (1995); *see also Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1272 (11th Cir. 2008) (citing 29 U.S.C. § 260). Then, if an employer has established good faith and reasonable grounds, we review the ultimate decision concerning an award of liquidated damages for an abuse of discretion. *Tefft*, 271 Mont. at 93, 894 P.2d at 324; *Rodriguez*, 518 F.3d at 1272.

¶26 Energy West first argues that because the jury found it did not act willfully in withholding overtime compensation from Tacke, the District Court was prohibited from awarding liquidated damages. Tacke

responds that, while she did not satisfy her burden of proving Energy West acted willfully, Energy West likewise failed to meet its burden of proving it acted in good faith and on reasonable grounds—an entirely different question.

¶27 The FLSA provides that if an employer withholds overtime compensation in violation of 29 U.S.C. § 207(a)(1), the employer "shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . *and in an additional equal amount as liquidated damages.*" 29 U.S.C. § 216(b) (emphasis added). However they may be perceived, liquidated damages are not for the purpose of punishing the employer, but for compensating employees "for any losses caused by delayed receipt of overtime wages they are due." *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 910 (3d Cir. 1991) (citation omitted). To avoid liquidated damages, an employer must first demonstrate that his actions were "in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA] . . . ." 29 U.S.C. § 260, *see also* 29 C.F.R. § 790.22.

¶28 The employer bears a "substantial burden" in demonstrating good faith and reasonable grounds. *Renfro v. City of Emporia*, 948 F.2d 1529, 1540 (10th Cir. 1991) (citation omitted); *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982). "Good faith" exists when the employer has "an honest intention to ascertain and follow the dictates of the Act." *Renfro*, 948 F.2d at 1540 (citation omitted). "Reasonable grounds" is an objective standard by which to evaluate the employer's behavior. *Renfro*, 948 F.2d at 1540 (citation omitted). Prior to a showing of good faith and reasonable grounds, "the

district court has *no discretion* to mitigate an employer's statutory liability for liquidated damages." *Marshall*, 668 F.2d at 753 (emphasis added, citation omitted). Only after the employer carries its burden may a district court, "in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title." 29 U.S.C. § 260.

¶29 We thus reject Energy West's suggestion that, because it did not act willfully, *ipso facto* it acted in good faith and on reasonable grounds. The question of willfulness determines the length of the statute of limitations. In "a cause of action arising out of a willful violation," instead of a two-year statute of limitations, the employee is entitled to a three-year statute of limitations. 29 U.S.C. § 255(a). To gain the additional year, the burden is on the *employee* to show the employer's actions were willful, meaning "deliberate," "intentional," or that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 135, 108 S. Ct. 1677, 1681, 1682 (1988). Here, the jury determined this standard had not been met, and Tacke was therefore entitled to the two-year statutory period. This determination, however, is an entirely different question than whether the employer acted in good faith and upon reasonable grounds. *See Rodriguez*, 518 F.3d at 1274. The *employer* bears the burden of demonstrating the good faith and reasonable grounds necessary to avoid an award of liquidated damages, and it is noteworthy that, in addition to being described as a "substantial burden," courts have stated that an employer's ability to escape liquidated damages is the exception, not the rule. *Walton v. United Consumers Club, Inc.*, 786 F.2d

303, 310 (7th Cir. 1986) (recognizing "[d]ouble damages are the norm, single damages the exception").[2]

¶30 Even if the employer carries this burden, the district court "may still award liquidated damages at its discretion in any amount up to that allowed by 29 U.S.C. § 216(b)." *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1416 n. 8 (5th Cir. 1990) (citing *McClanahan v. Mathews*, 440 F.2d 320, 323 (6th Cir. 1971); *Martinez v. Food City, Inc.*, 658 F.2d 369, 376 (5th Cir. Unit A 1981)). "[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds . . . , the court *may, in its sound discretion*, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title." 29 U.S.C. § 260 (emphasis added). Because Congress used the permissive word "may" instead of "shall," the District Court had no affirmative obligation to strike or reduce the liquidated damages award against Energy West. In light of the facts in this record, we conclude that the District Court was well within its discretion to decline to do so.

¶31 *3. Did the District Court err in awarding attorneys' fees to Tacke without requiring Tacke's counsel to provide contemporaneous time records?*[3]

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[2] The parties here agreed that whether Energy West acted in good faith and on reasonable grounds was a determination to be made by the court, not the jury.

[3] Energy West does not challenge the District Court's conclusion that a fee rate of $225 per hour was reasonable or its calculation of the lodestar amount.

¶32 FLSA provides that "[t]he court in such action shall . . . allow a reasonable attorney's fee to be paid by the [employer] . . . ." 29 U.S.C. § 216(b). To determine the attorneys' fees, courts use the "lodestar" method, which consists of "[m]ultiplying the number of hours reasonably spent on the case by an appropriate hourly rate in the community for such work." *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 799 (5th Cir. 2006) (per curiam) (citation omitted); *see also Laudert v. Richland Co. Sheriff's Dept.*, 2001 MT 287, ¶ 14, 307 Mont. 403, 38 P.3d 790. The lodestar method "is *presumed* to be the reasonable fee to which counsel is entitled." *Penn. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564, 106 S. Ct. 3088, 3098 (1986) (quoting *Blum v. Stenson*, 465 U.S. 886, 897, 104 S. Ct. 1541, 1548 (1984)) (emphasis in original, quotations omitted); *Laudert*, ¶ 17 (citation omitted). The party seeking the fees bears the burden of showing the "reasonableness of the hours billed." *Saizan*, 448 F.3d at 799. Reasonable fees do not include fees that were "unproductive, excessive, or redundant," and the fee claimant must establish reasonableness by the presentation of evidence. *Saizan*, 448 F.3d at 799 (citation omitted).

¶33 Energy West argues the District Court erred in awarding attorneys' fees because Tacke failed to submit contemporaneous time records detailing her counsel's work on the matter. Tacke rebuts Energy West's argument, first, by arguing Energy West neither requested the production of billing documentation nor produced its own number of hours worked on the case. However, it was not Energy West which was seeking a fee award. It was Tacke's burden, not Energy West's, to provide evidence demonstrating that her claimed attorneys' fees were reasonable. To

hold otherwise would shift Tacke's burden to Energy West.

¶34 Tacke then argues, as she did in the District Court, that she was not required to provide contemporaneous billing records and that her evidence was sufficient to carry her burden. The evidence Tacke submitted to the District Court consisted of two affidavits containing a total of seven sentences, expert deposition testimony, and testimony from Tacke's counsel. This evidence was long on opinion, but short on detail about the purpose of the hours claimed by the lawyers. The District Court concluded that the evidence, when coupled with its personal knowledge of the case, validated "the hours that have been submitted here are in fact reasonable."

¶35 However, unlike a district court, an appellate court lacks personal observation and involvement in a case that can be called upon when considering an attorneys' fees award. Without detailed evidence about the hours spent, we are left to assessing counsel's conclusory statements about lack of duplication or reasonableness on their face, or comparing contrary expert opinion. Appropriate appellate review is thereby hindered, and for this reason appellate courts nationally have required production of contemporaneous billing records, speaking with much frustration about the issue. The Second Circuit admonished plaintiffs' counsel in a similar, fee-shifting circumstance:

> In light of the difficulties that can be traced to the failure of plaintiffs' attorneys to keep contemporaneous time records, we are tempted

> to accept the State's proposal that plaintiffs be denied all attorney's fees.
>
> . . .
>
> [T]he difficulties raised by the lack of contemporaneous records in this case convince us of the need to announce for the future that contemporaneous time records are a prerequisite for attorney's fees in this Circuit.

N.Y. State Assoc. for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1147 (2d Cir. 1983) (analyzing award of reasonable attorneys' fees under 42 U.S.C. § 1988). We are similarly "tempted" in this case. Other courts have likewise expressed these concerns. *See e.g. Natl. Assoc. of Concerned Vets. v. Sec. of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984); *In re Hudson & Manhattan R.R.*, 339 F.2d 114, 115 (2d Cir. 1964); *Sussman v. Patterson*, 108 F.3d 1206, 1212 (10th Cir. 1997); *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939 (1983) ("Where the documentation of hours is inadequate, the district court may reduce the award accordingly."); *Erickson v. City of Topeka*, 239 F. Supp. 2d 1202, 1206 (D. Kan. 2002) ("To satisfy the burden of proving a reasonable fee, counsel must keep contemporaneous and detailed records of time . . . .") (citation omitted); *Bergeson v. Dilworth*, 875 F. Supp. 733, 737 (D. Kan. 1995) (production of time records required when attorneys work on a contingent fee basis).

¶36 Tacke further argues that even if she wanted to produce the billing records, both the attorney-client privilege and work-product doctrine preclude her from doing so. In asserting the attorney-client privilege, Tacke cites to *Clarke v. American Commerce Natl.*

Bank, 974 F.2d 127 (9th Cir. 1992). However, assuming *Clarke* applies, it does not support a blanket prohibition on providing billing records. There, the American Commerce National Bank (ACNB) allegedly paid the personal legal expenses for its chairman. *Clarke*, 974 F.2d at 128. The Office of the Comptroller of the Currency investigated the matter further, and eventually issued an administrative subpoena to ACNB for the production of billing statements from outside legal counsel. *Clarke*, 974 F.2d at 128. ACNB asserted the attorney-client privilege, and after reviewing the records, the Ninth Circuit concluded:

> [The billing statements] do not contain privileged communications between attorney and client. The statements contain information on the identity of the client, the case name for which payment was made, the amount of the fee, and the general nature of the services performed.

Clarke, 974 F.2d at 130. While *Clarke* protects records "which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided," it does not support a blanket prohibition on the use of billing statements. *Clarke*, 974 F.2d at 129. In-camera review by the district courts, accompanied with the use of redaction when necessary, will accommodate the need for such records in order to demonstrate the reasonableness of fee awards in fee-shifting cases while also protecting the attorney-client privilege. *See e.g. Huether v. Dist. Ct. of the Sixteenth Jud. Dist.*, 2000 MT 158, ¶ 22, 300 Mont. 212, 4 P.3d 1193.

¶37 Equally unpersuasive is Tacke's argument that the work-product doctrine also prohibits the use of billing statements to support an attorneys' fees claim. The work-product doctrine, as delineated in M. R. Civ. P. 26(b)(3), "is broader in application than the attorney-client privilege, but it is not an absolute privilege." *Kuiper v. Dist. Ct. of the Eighth Jud. Dist.*, 193 Mont. 452, 462, 632 P.2d 694, 700 (1981). To interpret the doctrine as imposing a blanket prohibition on the use of administrative records, such as time and billing documents, stretches the privilege too far. As generally noted, "the work product rule cannot be invoked by an attorney in connection with an affirmative claim for recovery of attorney's fees to avoid a discovery inquiry concerning possible apportionment of fees among compensable and noncompensable claims." 23 Am. Jur. 2d *Depositions and Discovery* § 45 (2002) (citing *Martin v. Paunovich*, 632 So. 2d 611 (Fla. 5th Dist. App. 1993)); *see also First Union Natl. Bank of S.C. v. Soden*, 511 S.E.2d 372, 380 (S.C. App. 1998) (analyzing billing statement as not falling within work product). To the extent billing records may contain "ordinary work product" or "opinion work product," the records are, again, subject to redaction of such information. *See e.g. Palmer by Diacon v. Farmers Ins. Exch.*, 261 Mont. 91, 115, 118, 861 P.2d 895, 910, 912 (1993).

¶38 The District Court conducted a careful review of the fee issue and we conclude that it exercised conscientious judgment and did not clearly err in evaluating the evidence or abuse its discretion in approving the fee award. However, while we do not adopt a per se rule as some courts have done, we strongly urge counsel to keep and provide contemporaneous time records in support of attorneys'

fees requests in fee-shifting cases, and we encourage district courts to look askance at requests not so supported.

¶39 *4. Did the District Court err in awarding costs pursuant to FLSA instead of the Montana costs statute?*

¶40 Energy West argues the District Court erred by awarding costs beyond those allowed under § 25-10-201, MCA, which it argues is controlling. Tacke responds that costs in this case should be awarded pursuant to 29 U.S.C. § 216(b), not § 25-10-201, MCA.

¶41 Tacke brought this case under FLSA, which provides that "[t]he court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). Montana's cost statute allows the following costs:

> (1) the legal fees of witnesses, including mileage, or referees and other officers;
> (2) the expenses of taking depositions;
> (3) the legal fees for publication when publication is directed;
> (4) the legal fees paid for filing and recording papers and certified copies of papers necessarily used in the action or on the trial;
> (5) the legal fees paid stenographers for per diem or for copies;
> (6) the reasonable expenses of printing papers for a hearing when required by a rule of court;
> (7) the reasonable expenses of making transcript for the supreme court;

> (8) the reasonable expenses for making a map or maps if required and necessary to be used on trial or hearing; and
> (9) other reasonable and necessary expenses that are taxable according to the course and practice of the court or by express provision of law.

Section 25-10-201, MCA. Energy West challenges the District Court's award of costs for mediation fees, legal research, copies, postage, and the construction and synchronization of a deposition, arguing they exceed the costs allowed by § 25-10-201, MCA.

¶42 When determining which statute to apply, we are to use the particular over the general. Section 1-3-225, MCA. Our decision in *Kuhr v. City of Billings*, 2007 MT 201, 338 Mont. 402, 168 P.3d 615, provides helpful guidance. In *Kuhr*, the employees pursued a wage claim under the state statutory scheme. *Kuhr*, ¶ 8. The parties argued whether costs should be awarded under the general costs statute or pursuant to § 39-3-214, MCA, of the wage claim statutes. *Kuhr*, ¶ 35. We reasoned that "a more specialized statute" may require its application instead of the general costs statute. *Kuhr*, ¶ 37. We concluded that "[t]his is a wage claim case specifically covered by a more specialized statute," and applied § 39-3-214, MCA, the statute awarding costs in wage claims, instead of the general costs statute, § 25-10-201, MCA. *Kuhr*, ¶ 37.

¶43 Similar to *Kuhr*, FLSA's cost provision is more specific and should control over Montana's general costs statute. To effectuate FLSA's policies, "Congress has permitted individual employees to sue for back wages and liquidated damages and to receive

reasonable attorney's fees and costs." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740 n. 16, 101 S. Ct. 1437, 1444 n. 16 (citing 29 U.S.C. § 216(b)). In keeping with the purpose of FLSA and our logic in *Kuhr*, 29 U.S.C. § 216(b) should govern instead of § 25-10-201, MCA.[4]

¶44 *5. Did the District Court err in admitting Tacke's exhibits 2, 3, 4, and 13 over Energy West's objections?*

¶45 Energy West argues that Tacke's exhibits of 2, 3, 4, and 13 were irrelevant, confusing, and should have been excluded. Tacke responds that these exhibits were relevant because they allowed the jury to compare her classification and duties when classified as non-exempt with her duties when classified as exempt. Tacke further argues that Energy West did not raise the proper objection for exhibits 2 and 4.

¶46 Relevant evidence includes "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M. R. Evid. 401. The exhibits at issue are

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[4] Our holding is limited by Energy West's narrow argument that the District Court erred in awarding costs beyond those allowed under § 25-10-201, MCA. While we reject application of § 25-10-201, MCA, to the case *sub judice*, no argument is made that the costs awarded here were not allowable under 29 U.S.C. § 216(b). There is authority on that issue, but we leave the issue for another day. *See e.g. Cho v. Koam Med. Servs. P.C.*, 524 F. Supp. 2d 202, 212 (E.D.N.Y. 2007) (denying legal research costs); *Williams v. R.W. Cannon, Inc.*, 657 F. Supp. 2d 1302, 1316 (S.D. Fla. 2009) (denying mediation expenses); *Calderon v. Witvoet*, 112 F.3d 275, 276 (7th Cir. 1997) (per curiam) (referring to 28 U.S.C. § 1920 to determine costs).

three job descriptions which were not generated during the 2002 to 2005 time period at issue, and a letter dated October 29, 1990, informing Tacke that she was classified as non-exempt and must report her overtime.

¶47 After reviewing the record, we believe Energy West properly raised a relevance objection, but conclude the District Court did not abuse its discretion in admitting the exhibits. While we see Energy West's concern about relevance, the admitted exhibits, though covering a different time period when Tacke was paid as an hourly employee, provided the jury with additional information about Energy West's classification and reclassification of Tacke's position and whether Energy West had acted willfully.

¶48 Even if relevant, evidence may be excluded if it has the propensity to confuse the issue or mislead the jury. M. R. Evid. 403. Here, the District Court required Tacke to lay additional foundation about the exhibits and Energy West had the opportunity through cross-examination, case-in-chief, and closing arguments to clarify any potential confusion that the exhibits caused.

¶49 Affirmed.

/S/ JIM RICE

We concur:

/S/ W. WILLIAM LEAPHART
/S/ BRIAN MORRIS
/S/ PATRICIA O. COTTER
/S/ JAMES C. NELSON

APPENDIX B

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

Cause No. BDV-05-1064

[Dated July 21, 2009]

DELORES TACKE,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ENERGY WEST, INC.,	)
	)
Defendant.	)
	)

ORDER RE: ATTORNEY FEES AND COSTS

On July 21, 2009, a hearing was held on Plaintiffs Motion for Attorney Fees and Costs. Plaintiff was represented by Elizabeth Best and Howard Strause. Defendant was represented by Mark Higgins and Richard Selby. The Court considered the testimony, evidence, and arguments presented and issued findings of fact, conclusions of law, and an order in open court which are incorporated herein as if set forth fully.

THEREFORE, IT IS HEREBY ORDERED:

1. That Plaintiff is entitled to recover the following costs from Defendant:

   $4372.10 Expert witness fee of Peter Meloy;
   $1147.10 Travel expenses for Howard Strause.

2. That Plaintiff is entitled to recover the following attorney fees from Defendant:

Elizabeth Best 425.5 hours at $225.00 per hour =	$95,737.50
Howard Strause 403 hours at $225.00 per hour =	$90,675.00
	$186,412.50

DATED this 21st day of July, 2009.

/s/Julie Macek
JULIE MACEK
DISTRICT COURT JUDGE

cc: Howard Strause, Esq.
1917 West Hill Place
Great Falls MT 59404

Elizabeth Best, Esq.
PO Box 2114
Great Falls MT 55403

Attorneys for Plaintiff

Mark Higgins, Esq.
PO Box 1746
Great Falls MT 59403

Richard Selby, II, Esq. (#0059996)
Dworken & Bernstein Co., L.P.A.
60 South Park Place
Painseville, OH 44077

Attorneys for Defendant

APPENDIX C

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

Cause No. BDV-05-1064

[Dated January 14, 2009]

DELORES TACKE,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ENERGY WEST, INC.,	)
	)
Defendant.	)
	)

SECOND AMENDED PARTIAL JUDGMENT

This case having come for trial with jury on November 10, 2008, and after consideration of the testimony presented and evidence introduced, the jury did, on November 14, 2008, return a Special Verdict in favor of Plaintiff, Delores Tacke, awarding Plaintiff the sum of Thirty Five Thousand, Two Hundred Twenty Dollars ($35,220.00) in damages against Energy West, Incorporated.

The Court held a hearing on January 12, 2009. Plaintiff was represented by Howard Strause and

Elizabeth Best. Defendant was represented by Richard Selby and Mark Higgins. The Court considered the testimony and evidence presented at trial, arguments of counsel, briefs and other papers filed by the parties on the subject of liquidated damages and costs.

A copy of said Special Verdict is attached hereto and by this reference made a part hereof;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That Plaintiff Delores Tacke in the above-entitled action shall have judgment against Defendant, Energy West, in the sum of Thirty Five Thousand, Two Hundred Twenty Dollars ($35,220.00);

2. That the Plaintiff be awarded liquidated damages in the sum of Thirty Five Thousand, Two Hundred Twenty Dollars ($35,220.00); and

3. That the Plaintiff be awarded reasonable costs of this lawsuit in the sum Four Thousand, Nine Hundred Fifty Eight and Seventy Three Cents ($4,958.73).

4. That the Plaintiff be further awarded her reasonable attorney fees and costs, the amount to be determined at a later date.

DATED this 14th day of January, 2009.

JULIE MACEK
THE HONORABLE JULIE MACEK

cc: Richard N. Selby, II., Esq.
Mark Higgins, Esq.
Elizabeth A. Best, Esq.
Howard F. Strause, Esq.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

Cause No. BDV-05-1064

[Filed November 14, 2008]

DELORES TACKE,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ENERGY WEST, INC.,	)
	)
Defendants.	)
	)

SPECIAL VERDICT FORM

1. Did Delores Tacke prove by a preponderance of the evidence that Energy West failed to pay her overtime wages?

   X yes
   ____ no

   A) If **no**, go no further and inform the bailiff you have reached a verdict.
   B) If **yes**, proceed to question #2.

2. Did Energy West prove by a preponderance of the evidence that Delores Tacke was exempt from payment of overtime due to the administrative exemption?

____ yes
X no

A) If **yes**, go no further and inform the bailiff you have reached a verdict.
B) If **no**, proceed to question #3.

3. Did Delores Tacke prove by a preponderance of the evidence that Energy West's failure to pay overtime was willful?

____ yes
X no

A) If **yes**, proceed to #4.
B) If **no**, skip question #4 and proceed to question #5.

4. If you found Energy West acted willfully, what is the amount of unpaid wages owed to Delores Tacke for the period from September 15, 2002 to July 15, 2005?

$_____

If you have answered question #4, go no further and inform the bailiff you have reached a verdict.

5. If you found Energy West did not act willfully, what is the amount of unpaid wages owed to Delores Tacke for the period from September 15, 2003 to July 15, 2005?

$35,220.00

Please sign the verdict form and return it to the bailiff.

/s/ _____
Jury Foreperson

Dated this 14 day of November, 2008.

APPENDIX D

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

Cause No. BDV-05-1064
MF64FR9385

[Filed December 4, 2008]

DELORES TACKE,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ENERGY WEST, INC.,	)
	)
Defendant.	)
	)

AMENDED PARTIAL JUDGMENT

This case having come for trial with jury on November 10, 2008, and after consideration of the testimony presented and evidence introduced, the jury did, on November 14, 2008, return a Special Verdict in favor of Plaintiff, Delores Tacke, awarding Plaintiff the sum of Thirty Five Thousand, Two Hundred Twenty Dollars ($35,220.00) in damages against Energy West, Incorporated..

A copy of said Special Verdict is attached hereto and by this reference made a part hereof;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That Plaintiff Delores Tacke in the above-entitled action shall have judgment against Defendants, Energy West, in the sum of Thirty Five Thousand, Two Hundred Twenty Dollars ($35,220.00);

2. That the Plaintiff be further awarded her reasonable attorney fees and costs; and

3. That the Plaintiff be awarded liquidated damages to be determined by the Court after a hearing to be held on Monday, January 12, 2009 at the hour of 9:00 o'clock a.m.

DATED this 4th day of December, 2008.

/s/JULIE MACEK
THE HONORABLE JULIE MACEK

cc: Richard N. Selby, II., Esq.
Mark Higgins, Esq.
Elizabeth A. Best, Esq.
Howard F. Strause, Esq.

***

Special Verdict Form
[formatted in this appendix at pages 29a-31a]

APPENDIX E

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

Cause No. BDV-05-1064
MF64FR9385

[Filed November 25, 2008]

DELORES TACKE,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ENERGY WEST, INC.,	)
	)
Defendant.	)
	)

JUDGMENT

This case having come for trial with jury on November 10, 2008, and after consideration of the testimony presented and evidence introduced, the jury did, on November 14, 2008, return a Special Verdict in favor of Plaintiff, Delores Tacke, awarding Plaintiff the sum of Thirty Five Thousand, Two Hundred Twenty Dollars ($35,220.00) in damages against Energy West, Incorporated.

A copy of said Special Verdict is attached hereto and by this reference made a part hereof;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That Plaintiff Delores Tacke in the above-entitled action shall have judgment against Defendants, Energy West, in the sum of Thirty Five Thousand, Two Hundred Twenty Dollars ($35,220.00); and

2. That the Plaintiff be further awarded her reasonable attorney fees and costs.

DATED this 25th day of November, 2008.

/s/JULIE MACEK
THE HONORABLE JULIE MACEK

cc: Richard N. Selby, II., Esq.
Mark Higgins, Esq.

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Special Verdict Form
[formatted in this appendix at pages 29a-31a]